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English only

Meeting of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction

2018 Meeting
Geneva, 4-7 December 2018

Meeting of Experts on Assistance, Response and Preparedness
Geneva, 14-15 August 2018
Item 6 of the provisional agenda
Procedures, including the establishment and use of the assistance database to improve the prompt and efficient response without preconditions to a request of assistance by a State Party under Article VII, and coordination and cooperation among States Parties and with relevant international and regional organizations such as World Health Organization (WHO), World Organisation for Animal Health (OIE), Food and Agriculture Organization (FAO), as appropriate

Investigations of Alleged Biological Weapons Use: Overlap with Public Health Assistance under Article VII of the Biological and Toxin Weapons Convention

Submitted by the United States of America

Summary

Allegations of biological weapons use should be investigated by an organization that can maintain its independence and objectivity in order to determine whether an outbreak is deliberate or natural and, if necessary, to attribute responsibility. There are several mechanisms by which such an investigation could be initiated. It is likely that such an investigation would occur concurrently with an international public health effort to provide assistance under Article VII. There might well be areas of overlap between these parallel efforts, and entities seeking to carry out their missions might encounter challenges in areas such as preservation of evidence. MOUs could play an important role in mitigating tensions between different organizations. To the extent possible, it would be useful to identify and define in advance the procedures, guidelines, and standards of evidence that would be necessary for both an investigation of alleged use and a public health assistance mission.

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I. Introduction: Investigations of Alleged Use

1. In cases of alleged biological weapons use, it may prove difficult to determine whether an outbreak of disease is a naturally occurring biological event or the result of an intentional attack, let alone to determine who was responsible for the attack. The political context could become heated, with charges and counter-charges, and the security situation unstable or dangerous. There is clear value, therefore, in having allegations of biological weapons use investigated by an organization that can maintain its independence and objectivity, and in having the procedures, guidelines, and standards of evidence identified in advance to the extent possible while maintaining flexibility to suit the circumstances of the case. Such an investigation of alleged use can help to confirm whether an outbreak is deliberate or natural and, in the event of an intentional attack, can help to attribute responsibility.

2. Any investigation into allegations of biological weapons use, however it is initiated, would occur concurrently with public health efforts to identify and mitigate the disease outbreak. Guidance is needed to ensure that an investigation of alleged use and a public health assistance mission, which may be running in parallel, do not hamper each other's work. This is particularly true if the State Party that is the victim of the biological attack initiates a criminal investigation at the domestic level, in addition to requesting an international investigation of alleged use. Those conducting such investigations might well need to collaborate where possible in order to ensure efficiency and avoid duplication of effort, but would also need to retain their independence in order to maintain credibility. This paper identifies some of the possible areas of overlap and potential challenges for multiple entities carrying out their missions in the aftermath of an alleged use of a biological agent, and offers some suggestions for how they might work together more effectively.

II. Processes for Investigating Allegations of Biological Weapons Use

3. An international investigation might be conducted through several different processes. For example, the so-called "United Nations Secretary-General's Mechanism" (UNSGM) was recognized by the 2006 BWC Review Conference as an existing international apparatus for conducting impartial investigations into cases of alleged use. As we noted in our 2016 working paper, "Possibilities for strengthening the international community's ability to investigate alleged use" (BWC/Conf.VIII/PC/WP.10), this mechanism itself could be initiated in several ways, all of which are fully consistent with the provisions of the BWC.

4. Other mechanisms also exist by which an investigation into alleged use of biological weapons could be initiated. Article VI of the BWC provides that:

> "Any State Party to this Convention which finds that any other State Party is acting in breach of obligations deriving from the provisions of the Convention may lodge a complaint with the Security Council of the United Nations. Such a complaint should include all possible evidence confirming its validity, as well as a request for its consideration by the Security Council."

Article VI also requires States Parties to cooperate in carrying out a Security Council-initiated investigation. It is also possible that an investigation conducted by the UN Secretary-General could inform an Article VI complaint to the Security Council; these procedures are not mutually exclusive. And, of course, neither of these mechanisms would limit the ability of a victim state to launch its own investigation through domestic law

enforcement, which could play a role in determining attribution and/or holding the perpetrators accountable in a domestic court.

III. Training

5. The timely and efficient international investigation of alleged use of biological weapons will rely on the technical knowledge and skills of experts who would be called upon to carry out fact-finding missions. Since 2009, several BWC Member States, including Australia, Canada, Sweden, Switzerland, Germany, Denmark, France, the United States and the United Kingdom, have sponsored specialized training courses, exercises, and workshops for experts on the Secretary-General's roster. Many other countries have contributed to the ability of the Secretary-General to conduct an investigation by nominating experts and consultants to the roster.

6. In 2011, the World Health Organization (WHO) and the United Nations signed a Memorandum of Understanding (MOU) on the support that the WHO could provide to the Secretary-General's Mechanism. Among other activities, WHO agreed to provide support in training the experts on the Secretary-General's Mechanism roster by providing presentations and materials on the procedures and logistics of outbreak investigation for public health emergencies and associated training modules for experts. In addition, WHO and the United Nations agreed to "extend to each other invitations for participation in relevant training and educational activities." MOUs have also been reached with the Organisation for the Prohibition of Chemical Weapons (OPCW), Interpol, and the International Organisation for Animal Health (OIE). It can be expected that similar measures of cooperation would be extended to an investigation under the aegis of the Security Council.

7. In the event of an alleged biological weapons attack, cooperation at both the domestic and international levels between public health and security authorities in the early stages of a response is critical both to containing the outbreak and identifying those responsible. However, many countries may not have the necessary capacity or infrastructure to promote collaboration between these different sectors. Moreover, joint training between public health authorities and local or national law enforcement is particularly lacking. This could lead to friction and gaps in information-sharing if these entities are simultaneously responding to the outbreak. These problems could in turn jeopardize the effectiveness and credibility of international investigations of alleged use. Joint training opportunities can enable public health and law enforcement officials to better understand each discipline's roles and responsibilities, enabling them to build working relationships, which is crucial for the identification and investigation of a biological weapons attack.

IV. Interviews

8. Both public health and law enforcement investigations into the alleged use of biological weapons require interviews with cases/victims and other witnesses. Such interviews can be an important element of a fact-finding mission; they can be crucial for the collection, assessment, or corroboration of information. From an epidemiologic perspective, interviews are key for determining the source of infections and mitigating the spread of disease.

9. Joint interviews involving public health, security authorities, and/or international investigators may allow representatives from each discipline the opportunity to collect and assess information according to their needs. When joint interviews are not possible, human,

animal, plant, or food health, law enforcement, and international investigation personnel could collaborate in advance to synchronize their interview questions, or share data from their interviews to support their investigations.

10. In some cases, international or national investigators might find medical, epidemiological, or other patient data helpful or even critical in seeking to attribute responsibility. Yet public health authorities may be concerned about legal liabilities for releasing patient information without the patient's consent, or about potentially jeopardizing trust in their organizations' neutrality. It would be beneficial for actors involved in both missions to discuss possible challenges to sharing information, such as protecting patient privacy, before beginning the interview process, or, ideally, before the initiation of the investigations. States Parties may wish to consider whether there are national-level mechanisms they could implement to facilitate such discussions.

V. Preservation of evidence

11. In the event of a deliberate attack, it is important to preserve evidence that could help in the investigation. The provenance of samples may be a key element of attributing an attack to a particular actor. It is critical that all involved in a response to a potential biological attack, including field teams and laboratories, are aware of the procedures to preserve forensic evidence, which may differ from traditional public health sampling and analytical methodologies.

12. Conflicts might arise between public health authorities and criminal or international biological weapons investigators regarding the collection, analysis, and preservation of samples or materials for evidence. For example, public health providers might be concerned that their ability to collect and analyze samples would be compromised by investigators' efforts to preserve evidence and maintain strict chain of custody requirements in order to ensure that future accountability measures can withstand scrutiny. Similarly, investigators might be reluctant to share forensic data if sharing that information could compromise their investigation, even though such data may be useful or even essential to public health authorities in mitigating the effects of a disease outbreak.

13. While priority must be given to the protection of public health and safety, it is important for experts, investigators, and public health officials to discuss these competing objectives ahead of time and identify mitigation strategies.

VI. Role of Formal Agreements

14. The MOUs between the UN and other international organizations such as WHO and OIE certainly go a long way in alleviating some of the potential areas of friction between an investigation under the Secretary-General's Mechanism or under the aegis of the Security Council and a public health mission. Possible cooperative activities include the secondment of public health experts to the UN Office of Disarmament Affairs; the provision of information on health and disease control methodologies; and the making available of equipment for outbreak investigation.

15. At the domestic level, the Global Health Security Agenda (GHSA) Action Package Respond-2 calls for GHSA member countries to link public health and security authorities to conduct a multi-sectoral response to a biological event of suspected or confirmed deliberate origin. GHSA members are encouraged to develop and implement MOUs or other similar frameworks to conduct and support joint criminal and epidemiologic investigations in the event of biological incidents suspected to be of deliberate origin. Such frameworks can be tremendously beneficial in facilitating effective information sharing and

ensuring that investigations and public health assistance missions reinforce and complement, rather than compromise, each other.

VII. Conclusions

16. We acknowledge the efforts of a number of countries in strengthening the Secretary-General's Mechanism and identifying possible challenges that an investigation might face. We support taking reasonable steps to strengthen the UN Secretary-General's Mechanism's operational capacity to investigate allegations of BW use. We are also pleased that the Secretary-General's May 2018 disarmament agenda includes efforts to strengthen the standing capacity to conduct independent investigations of alleged use of biological weapons.

17. As noted above, there are several mechanisms by which an alleged attack might be investigated, and several organizations that might be involved in the response, at both the international and domestic level. In summary, it is essential that public health organizations with the responsibility to respond to a disease outbreak and entities with a law enforcement- or internationally-initiated investigation mandate have good working relationships, opportunities to develop contacts with each other, and fora in which to discuss protocols and procedures in a hypothetical biological attack scenario.

18. Many BWC States Parties have expressed interest in establishing guidelines or procedures for a State Party to request assistance under Article VII, and we welcome this effort. Should the Meeting of Experts seek to develop such guidelines, we urge States Parties to keep in mind the potential sources of tension that an Article VII assistance mission might encounter with an investigation into alleged use, and consider whether any of the guidelines we put in place might help to mitigate these tensions.